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AUTHOR Sanders, Wayne C.
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ABSTRACT

The authority of the First Amendment may transcend the strictures of its original wording, which limits it to proscriptions of federal government suppression of speech. Attempts by some courts to extend First Amendment authority to the workplace is clearly related to the growing criticism of unrestrained managerial dismissal power. The first major attempt was the incorporation of freedom of speech and press rights under the authority of the due process clause of the Fourteenth Amendment, which is limited to protection against the actions of government. The 1983 case "Novosel v. Nationwide Insurance" attempted to bring the First Amendment freedom of speech protections to the private sector workplace using the common law. The United States Third Circuit Court of Appeals held that an employee could sue his or her employer using a tort of wrongful discharge if the dismissal violated public policy as derived from the First Amendment or Article I, Section 7 of the Pennsylvania Constitution. The authority to apply First Amendment freedom of speech protections remains unsettled, though the Fourteenth Amendment trend has brought tremendous change. (The "Novosel case" is discussed in depth.) (JD)

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VOLCANIC TREMORS IN THE THIRD CIRCUIT:
FIRST AMENDMENT FREEDOM OF SPEECH PROTECTIONS THROUGH COMMON LAW AUTHORITY

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Wayne C. Sanders
Associate Dean for Northern Virginia Programs
The National College of Education
1364 Beverly Road, Suite 102
McLean, Virginia USA 22101
(703) 749-3000

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I. INTRODUCTION

The legal history of freedom of speech in the United States has been shaped by two problems. The first problem is establishing the legal authority necessary to protect freedom of speech from those who would suppress it. The second problem is defining the scope and character of free speech protections.

Communication scholars generally limit their scholarship to the second problem--the scope and character of the protections. Except for a quick passing reference to Fisk v. Kansas¹ or Near v. Minnesota,² they rarely give a second thought to the authority of the courts to protect freedom of speech from federal or state governmental suppression. This should not be surprising since the legal authority to protect speech, grounded in the First Amendment of the United States Constitution, has remained largely unchanged for over fifty years. Yet, like a dormant volcano, radical change is clearly possible even if unlikely.

The purpose of this essay is to examine the authority of the First Amendment which has transcended, or might yet transcend, the strictures of its original wording--in particular the phrase "Congress shall make no law" which limits its authority to proscriptions of federal government suppression of speech. As an illustration of this quest for transcending authority, the problem of freedom of speech of employees will be examined. Particular attention will be paid to Novosel v. Nationwide Insurance, a recent attempt by the United States Third Circuit Court of Appeals to apply First Amendment protections through Pennsylvania common law.³

II. THE NEED FOR AUTHORITY

The attempts by some courts to extend First Amendment authority to the workplace is clearly related to the growing criticism of unrestrained managerial dismissal power. It is estimated that from 60% to 75% of all private non-agricultural workers have no contract for a fixed term and thus can be fired for a good reason, a bad reason, or no reason. In other words, they can be fired at the will of their employers. Several commentators estimate that from 200,000⁴ to 500,000⁵ employees are dismissed every year without just cause.

It should not be surprising that such unrestrained dismissal power can and is used to retaliate against employee speech, or the refusal of employees to speak. Employees have alleged that they were fired in retaliation of such speech acts as testifying in an anti-trust suit,⁶ refusing to cajole gasoline dealers into illegal price fixing,⁷ complaining about violations of food and drug laws,⁸ informing police about theft,⁹ complaining about unsafe oil and gas pipe which was later taken off the market,¹⁰ and reporting accounting irregularities in a publicly regulated utility.¹¹ The existence of retaliation by dismissal undoubtedly chills the speech of other employees.¹² It should also not be surprising that judges have sought the authority to apply First Amendment protections in order to remedy these abuses.

III. THE CHANGING AUTHORITY OF THE FIRST AMENDMENT

The First Amendment says: "Congress shall make no law"¹³ Initially, the term "congress" limited the legal authority of the First Amendment to protection against suppression of speech by the

federal government. In order to understand the implications of the most recent attempt to expand the authority of the First Amendment, it is useful to examine the history of attempts, both successful and unsuccessful, to overcome the limitations of the term "congress."

The authority necessary to apply First Amendment protections can be thought of as a volcano. There might be a sudden explosion of new authority which dramatically transforms the legal landscape, there might be a gradual change growing in power and intensity, or there might be a few short lived tremors and belches of smoke and gas followed by nothing else.

Fourteenth Amendment Changes in Authority

The first major attempt to transcend the First Amendment was the virtual incorporation of First Amendment freedom of speech¹⁴ and press¹⁵ rights under the authority of the due process clause of the Fourteenth Amendment. This was part of a trend of incorporating all of the first eight Amendments into the Fourteenth which started in 1897 and continued into the 1970s.¹⁶

Since the courts have thus far made no distinction between First Amendment and Fourteenth Amendment freedom of speech rights, it is easy to assume that the range of authority is fixed and not subject to expansion or contraction. However, the "Bill of Rights" are used as guideposts in the interpretations of the Fourteenth Amendment due process clause and are not, in and of themselves, absolute.¹⁷

In fact, the Supreme Court has held that congruent but different standards for federal and state activities are acceptable in rights concerning jury size and non-unanimous verdicts¹⁸ as well as search and seizure procedures.¹⁹ In addition, in Griswold v. Connecticut²⁰

and later Roe v. Wade²¹ the Supreme Court suggested that a "zone of privacy" is a right guided by rights found in the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments thus expanding Fourteenth Amendment due process rights beyond the specific wording of the "Bill of Rights."

The question of Fourteenth Amendment authority and freedom of speech still raises debate. Most recently, United States Attorney General Edwin Meese III criticized the federal judiciary and questioned whether the "doctrine of incorporation" is in accord with the framers' vision. In a blistering rebuttle published in the February 10, 1986 Christian Science Monitor, former Associate Justice Arthur Goldberg supported, ". . . Justices William Brennan and John Paul Stevens [who] have publicly taken sharp exception to these Meese views, terming them unfounded, simplistic, and anachronistic."²² According to Justice Goldberg:

Mr. Meese, however, is not engaging in an abstract, philosophical constitutional debate. He is insisting that it is time to rein in libertarian interpretations of the Constitution. Simply put, he wants "conservative" judges who share his views about abortion, school prayer, civil rights, and the like. He believes that federal judges have been "too liberal" or "too activist," whatever those terms mean.²³

The authority to restrain states in their suppression of speech under the Fourteenth Amendment has become very important for government employees. In 1968, the Supreme Court held that public employees are entitled to First and Fourteenth Amendment freedom of speech rights.²⁴

Since federal employees are usually protected by elaborate administrative procedures, it is the employees of state and local governments that have most often sought, with the aid of the Fourteenth Amendment, freedom of speech protections. A long line of case law is developing to outline the scope and character of the protections.²⁵

State Action Changes in Authority

The authority of the Fourteenth Amendment, like the First, is limited to protections against the actions of government. Employees whose speech is suppressed by private firms ordinarily do not enjoy Constitutional protection. However, several courts have used the concept of "state action" to extend Constitutional rights to employees of private organizations.

The concept of "state action" is used when the actions of a private employer can fairly be classified as a state action. The Supreme Court has ruled that state action is to be established on a case by case basis. Further complicating the problem is the existence of a variety of state action tests, which have not been overruled as new tests are introduced. A private organization is seen as engaging in state action when there is a close nexus relationship between the state and the organization;²⁶ when there is a symbiotic relationship between the state and the organization;²⁷ when the organization engages in a sovereign function usually reserved for the state;²⁸ or when there is state engagement that allows or encourages private organizations to engage in conduct that the state itself would be prohibited from doing.²⁹ The concept of state action had obvious appeal for judges who were looking for authority to protect the speech of employees.

The first successful attempt to protect speech came in the 1975

Second Circuit case of Holodnak v. Avco Corporation, Avco-Lycoming Division where the employee of a defense contractor, who did most of its work with the government and used government equipment and inspectors, was fired for criticizing company and union officials in a newspaper.³⁰ The success of this state action strategy created much speculation that the authority of the First and Fourteenth Amendments might be broadly expanded to cover organizations that did business with the government. David W. Ewing, a business professor and an editor of the Harvard Business Review, who would later write two influential books on worker rights, went so far as to claim:

No precedent could be more dangerous from the standpoint of an authoritarian company, and the decision could become the breach that the forces of change pour through. If a company with 80 percent of its sales to the government like Avco-Lycoming is subject to the new rule, why not one with 50 percent sales to the government? And then why not a company with 35 percent governmental sales?³¹

The possible expansion, foreseen by Ewing, did not come about. Despite a few "state action" findings concerning such organizations as a volunteer fire department³² and the Smithsonian Science Information Exchange,³³ most organizations--including a tourist facility firm in a National Park,³⁴ a mental health community center,³⁵ a legal aid society,³⁶ the Johnson Space Center Credit Union,³⁷ a community action agency,³⁸ and a government funded private high school³⁹--have not been found to have engaged in "state action."

Despite a few tremors and a trickle of lava, the volcano appears to have returned to dormancy. The "state action" doctrine does not appear

Common Law Authority

The most recent attempt to bring First Amendment freedom of speech protections to the private sector workplace used the authority of common law. In the 1983 case Novosel v. Nationwide Insurance, the United States Third Circuit Court of Appeals held that an employee could sue his or her employer using a tort of wrongful discharge if the dismissal violated a ". . . cognizable expression of public policy. . . derived in this case from either the First Amendment of the United States Constitution or Article I, Section 7 of the Pennsylvania Constitution."⁴⁰

Common law tort of wrongful discharge actions have been around since 1959.⁴¹ Usually based on some sort of statutorily defined concept of public policy, employees have been able to pursue tort of wrongful discharge actions when they were forced to do something illegal,⁴² give up statutory right,⁴³ forsake a statutory duty,⁴⁴ or were fired for reporting illegal activities.⁴⁵

Many of the employees in these cases were fired because of their speech. What distinguishes the Novosel case from the other cases is its definition of "public policy." In the other cases, the employees based their claims on narrow statutory provisions or narrow provisions in state constitutions. Their actions were based on what the legislatures thought were important enough to put into legislation. In other words, the acceptable topics of speech were defined by what the legislatures felt were important enough to draft statutes on in the first place. Even the whistleblowing cases

were limited to reporting activity made illegal by specific statute. In Novosel, "public policy" is based on the broad free speech provisions of the First Amendment and a similar provision in the Pennsylvania Constitution.

The Novosel case arose when a district claims manager, and a 15 year employee, of Nationwide Insurance, alleged that he was dismissed because he refused to lobby the Pennsylvania House of Representatives in support of a "No-Fault Reform Act" and because he privately stated his opposition to his company's political stand. "Specifically, employees were instructed to chip, copy, and obtain signatures on coupons bearing the insignia of the Pennsylvania Committee for No-Fault Reform."⁴⁶ The case was a diversity case which means that it went through the federal court system but that the courts were bound by existing Pennsylvania common law or the doctrinal trends of that common law.

Judge Arlin M. Adams wrote the opinion of the Court. The Adams decision clearly went well beyond the narrow confines of statutorily defined public policy. According to Adams:

The key question in considering the tort claim is therefore whether a discharge for disagreement with the employer's legislative agenda or a refusal to lobby the state legislature on the employer's behalf sufficiently implicate a recognized facet of public policy. The definition of a "clearly mandated public policy" as one that strikes at the heart of a citizen's social right, duties and

responsibilities." set forth in Palmateer v. International Harvester Co. 85 Ill.2d 124, 52 Ill. Dec 13, 421 N.E.2d 876 (1981), appears to provide a workable standard for the tort action. While no Pennsylvania law directly addresses the question at bar, the protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workman's compensation claim.⁴⁷

Judge Adams, clearly searching for authority, compared Novosel's situation to the public employee cases.

In dealing with public employees, the cause of action arises directly from the Constitution rather than from common law developments. The protection of important political freedoms, however, goes well beyond the question whether the threat comes from state or private bodies. The inquiry before us is whether the concern for the rights of political expression and association which animated the public employee cases is sufficient to state a public policy under Pennsylvania law. While there are no Pennsylvania cases squarely on this point, we believe that the clear direction of the opinions promulgated by the state's courts suggests that this question be answered in the affirmative.⁴⁸

Circuit Judge Edward Becker, although not on the original panel, expressed his reservations about the Novosel decision in a statement

concerning the denial of a petition for rehearing. He found three problems with the holding.

First, the opinion ignores the state action requirement of first amendment jurisprudence, particularly by its repeated, and, in my view, inappropriate citation of public employee cases, and by its implicit assumption that a public policy against government interference with free speech may be readily extended to private actors in voluntary association with one another. . . . Second, the opinion could be read to suggest that an explicit contractual provision authorizing an employer to dismiss a lobbyist for failure to undertake lobbying might be unenforceable or subject to a balancing test. Third, the opinion fails to consider other public policy interests, such as the economic interests of the public in efficient corporate performance, the first amendment interests of corporations. . . , and the legitimate interests of a corporation in commanding the loyalty of its employees to pursue its economic well being.⁴⁹

The meaning of the Novosel case is clearly that the Third Circuit has expanded First Amendment freedom of speech protections to private employees by using the authority of common law. However, if this is the start of a trend, it is slow in developing.

Since the Third Circuit Court of Appeals when acting in a diversity case is bound by Pennsylvania common law, the ultimate judge of the

authority will be the Pennsylvania Supreme Court. Thus far, the Court has not addressed the issue. Also, no other state court has addressed the authority issue despite citing the Novosel case for other reasons.⁴⁹

Of the federal cases which cited Novosel, only one tackled Constitutional issues.⁵⁰ In Ferguson v. Freedom Forge Corporation, the District Court for the Western District of Pennsylvania applied the Novosel logic to an employee who claimed that he had been fired because of his continued association with the company's former president.⁵¹ However, Judge Mencer examined analogous First and Fourteenth Amendment cases and found that, "The interest of a person to associate with a particular individual who is not a family member, does not rise to the same public policy level. The plaintiff has not stated a claim under the limited public policy exception to the employment-at-will doctrine in Pennsylvania."⁵²

IV. CONCLUSIONS

The authority to apply First Amendment freedom of speech protections is far from settled. Indeed, there have been several attempts to expand or contract the authority over the years. The Fourteenth Amendment incorporation trend has brought tremendous change. The state action trend appears to have lost momentum and has limited potential.

At this point, it is all but impossible to accurately predict the future impact of the tort of wrongful discharge strategy of

expanding First Amendment authority. It is up to state courts to make a determination on a state by state basis.

The authority of First Amendment freedom of speech is indeed like a volcano. There can be long periods of dormancy followed by an explosion of change like the incorporation of freedom of speech into the due process clause of the Fourteenth Amendment. There can be a few tremors and some activity which really never develops into much like the state action trend of giving freedom of speech protections to private employees. With tort of wrongful discharge strategies, we must patiently wait next to our legal seismographs for the results. The watch is important because the authority under which freedom of speech operates is every bit as critical as decisions about the scope and character of free speech protections.

NOTES

- ¹ 274 U.S. 380 (1927).
- ² 283 U.S. 697 (1931).
- ³ 721 F.2d 894 (3CA 1983).
- ⁴ "Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception," Harvard Law Review, 96 (1983), 1931-51.
- ⁵ Cornelius Peck, "Unjust Discharges From Employment: A Necessary Change in the Law," Ohio State Bar Journal, 40 (1979), 1-49.
- ⁶ Phillips v. Goodyear Tire and Rubber Company, 651 F.2d 1051 (5CA 1981).
- ⁷ Tameny v. Atlantic Richfield Company, 610 P.2d 1330 (Col. 1980).
- ⁸ Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980).
- ⁹ Palmateer v. International Harvester Company, 421 N.E.2d 876 (Ill. 1981).
- ¹⁰ Geary v. United States Steel Corporation, 319 A.2d 174 (Pa. 1974).
- ¹¹ Suchadolski v. Michigan Consolidated Gas Company, 316 N.W.2d (Mich. 1982).
- ¹² The chilling argument was advanced nearly twenty years ago. See: Lawrence E. Blades, "Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power," Columbia Law Review, 67 (1967), 1404-35.
- ¹³ USCA Amend 1.
- ¹⁴ Fisk v. Kansas, 274 U.S. 380 (1927).
- ¹⁵ Near v. Minnesota, 283 U.S. 697 (1931).

¹⁶ For an excellent discussion of this trend, see: Laurence H. Tribe, "Model V - The Model of Preferred Rights: Liberty Beyond Contract," in his American Constitutional Law, (Mineola, N.Y.: Foundation, 1978), 564-75.

¹⁷ See: Adamson v. California, 332 U.S. 46 (1947).

¹⁸ See: Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 356 (1972).

¹⁹ See: Ker v. California, 374 U.S. 23 (1963).

²⁰ Griswold v. Connecticut, 381 U.S. 479 (1965).

²¹ Roe v. Wade, 410 U.S. 113 (1973).

²² Arthur J. Goldberg, "Ed Meese vs. John Marshall: Original Intent, or Evolutionary View?" Christian Science Monitor, 10 February 1986, p. 20, col. 1.

²³ Goldberg, p. 20, col. 3.

²⁴ See: Pickering v. Board of Education, 391 U.S. 563 (1968).

²⁵ For example see: Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Connick v. Myers, 461 U.S. 138 (1983); Rowland v. Mad River Local School District, 105 S.Ct. 1373 (Cert. Denied 1985).

²⁶ See: Jackson v. Metropolitan, Edison Company, 419 U.S. 345 (1974).

²⁷ See: Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

²⁸ See: Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978).

²⁹ See: Reitman v. Mulkey, 387 U.S. 369 (1967).

³⁰ 514 F.2d 285 (CA2 1975).

³¹ "Winning Freedom on the Job: From Assembly Line to Executive Suite," The Civil Liberties Review July-August, 1977, p. 12.

³² See: Janusaitis v. Middlebury Volunteer Fire Department, 607 F.2d 17 (1979).

³³ See: Foster v. Ripley, 645 F.2d 1142 (1981).

³⁴ See: Friends of Yosemite v. Frissell, 420 F. Supp. 390 (1974).

³⁵ See: Johnson v. Southwest Detroit Community Mental Health Services, 462, F. Supp. 106 (1978).

³⁶ See: Graseck v. Mauceri, 582 F.2d 203 (1978).

³⁷ See: Heiskala v. Johnson Space Center Federal Credit Union, 474 F. Supp. 448 (1979).

³⁸ See: Griffith v. Bell-Whitley Community Action Agency, 614 F.2d 1102 (1980).

³⁹ See: Rendell-Baker v. Kohn, 641 F.2d 14 (1981).

⁴⁰ 721 F.2d 894, 899 (1983).

⁴¹ See: Petermann v. International Brotherhood of Teamsters, 344 P.2d 25 (Cal. 1959).

⁴² For example see: Tameny v. Atlantic Richfield Company, 610 P.2d 1330 (Cal. 1980); Trombetta v. Detroit, Toledo & Ironton Railroad Company, 265 N.W.2d 385 (Mich. 1978).

⁴³ For example see: Frampton v. Central Indiana Gas Company, 245 N.W.2d 151 (1973); Sventko v. Kroger, 245 N.W.2d 151 (Mich. 1976); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1979); Shanhaltz v. Monangahela Power Co., 270 S.E.2d 178 (W. Va. 1978); Lally v. Copygraphics, 428 A.2d 1317 (N.J. 1981); Clifford v. Cactus Drilling Corporation, 312 N.W.2d 381 (Mich. 1981); Molush v. Orkin Exterminating Co., Inc., 547 F.Supp. 54 (ED PA 1982).

⁴⁴ For example see: Nees v. Hocks, 536 P.2d 512 (Or. 1975); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. 1978); Palmateer v. International Harvester Company, 421 N.E.2d 876 (Ill. 1981); Kalman v. Grand Union Company, 443 A.2d 728 (N.J. 1982); Perry v. Hartz Mountain, 537 F.Supp. 1387 (S.D.I.N. 1982); Sheets v. Teddy's Frosted Foods, 427 A.2d 385 (Conn. 1980).

⁴⁵ For example see: Harless v. First National Bank of West Virginia, 246 S.E.2d 270 (1976); Adler v. American Standard Corporation, 538 F.Supp. 572 (1982); Petrik v. Monarch Printing Corporation, 444 N.E. 2d 588 (1982).

⁴⁶ 721 F.2d 894, 896 (1983).

⁴⁷ 721 F.2d 894, 899 (1983).

⁴⁸ 721 F.2d 894, 900 (1983).

⁴⁹ See: Leikvold v. Valley View Community Hospital, 688 P.2d 170 (Ariz. 1984); Corbin v. Sinclair Marketing, Inc., 684 P.2d 265 (Colo. 1984); Romf v. John Q. Hammons Hotels, Inc., 685 P.2d 25 (Wyo. 1984); Meeks v. Opp Cotton Mills, Inc., 459 So.2d 814 (Ala. 1984).

⁵⁰ See: Adams v. Budd Co., 583 F.Supp. 711 (E.D.P.A. 1984); Ferguson v. Freedom Forge Corporation, 604 F.Supp. 1157 (W.D.P.A. 1985); Wolk v. Saks Fifth Avenue, 728 F.2d 221 (3CA 1984); Sharon Steel Corporation v. The VJR Company, 604 F.Supp. 420 (W.D.P.A. 1985); Kamens v. Summit Stainless, 586 F.Supp. 324 (E.D.P.A. 1984); Karr v. Township of Lower Merion, 582 F.Supp. 410 (E.D.P.A. 1983); Shipkowski v. United States Steel, 585 F.Supp. 66 (E.D.P.A. 1983).

⁵¹ 604 F.Supp. 1157 (W.D.P.A. 1984).

⁵² 605 F.Supp. 1157, 1160 (W.D.P.A. 1985).